Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 86-1371

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TELECOMMUNICATIONS RESEARCH AND ACTION CENTER and MEDIA ACCESS PROJECT,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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ARGUMENT

We agree with the Federal respondents that there is one new development subsequent to the filing of the petition—significant Congressional action—that the Court should take into account. On April 21, 1987, the Senate passed S. 742 to "clarify" its intent and codify the fairness doctrine, S. Rept. No. 100-34, 100th Cong., 1st Sess., at 1, and the House is well on its way to passing identical legislation, H.R. 1934, 100th Cong., 1st Sess.[1] This legislative process confirms our position that the "Fairness Doctrine is at the heart of [the public trust] obligations . . .," S. Rept. No. 100-34, *supra*, p.33, and that the decision below thus undermines the public trustee concept in the broadcast field.[2]

Furthermore, the prompt Congressional action decidedly repudiates respondents' strained attempt to pass off that decision as a narrow ruling confined to teletext.[3] The court of appeals and the Commission have also fully recognized that the decision impacts

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[1] See 133 Cong. Rec. S5218-S5232 (daily ed. Apr. 21, 1987; 133 Cong. Rec. D634 (daily ed. May 7, 1987).

[2] The Senate Report notes that the issue is now before this Court, stating (*id.* at 3):

> "It should be noted that the Committee believes the Court of Appeals decision wrongly interpreted the 1959 amendments and that the Congress did explicitly place the Fairness Doctrine in the Communications Act at this time. While the Committee urges the U.S. Supreme Court to reverse the lower court's holding it cannot risk a contrary result. That is why it is essential that this legislation proceed."

[3] Indeed, the court below only reached the issue of Congressional intent with respect to fairness because it first found that teletext is broadcasting, a holding respondents do not mention.

general broadcasting. In *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987), raising First Amendment questions upon a Commission fairness ruling against a television station, the court remanded the case for consideration of the constitutional issues, stating (*id.* at 873, n.11) that after the court's decision herein removing the statutory impediment, the Commission could no longer refrain from consideration of the constitutional issues, unless it resolved the matter on public interest grounds. In response, the Commission requested general public comment on the constitutionality of the fairness doctrine and on whether its enforcement is contrary to the public interest. *Order* in re Complaint of Syracuse Peace Council, FCC 87-33, 52 Fed. Reg. 2805 (Jan. 27, 1987).

We suggest that the Court withhold action on the pending petition until the legislative process has run its full course, probably by mid-summer. If the bills become law, the petition should of course be denied or dismissed as moot. But if the legislation fails because of a Presidential veto and failure to override, the important issue raised remains pertinent. In that event, we urge that certiorari should be granted and that the case for summary reversal remains strong in light of the controlling decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

Respectfully submitted,

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